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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1950

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GULLETT GIN COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered on January 30, 1950 (R. 114–118), modifying an order issued by the Board against the Gullet Gin Company, Inc., (R. 53–60).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 114–118) is reported in 179 F. 2d 499. The Board's petition for rehearing was denied without opinion on March 18, 1950. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 53–107) are reported at 83 NLRB No. 1.

JURISDICTION

The decision of the Court of Appeals was entered on January 30, 1950. The petition for rehearing was denied on March 18, 1950. The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., as codified June 25, 1940, and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board is required to permit an employer to deduct from the back pay due discriminatorily discharged employees under an order of the Board sums which the employees may have received from the State as unemployment compensation benefits.

STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. II, Secs. 141, *et seq.*), Section 10 (c); Louisiana Unemployment Compensation Law (Dart's La. Gen. Stat. 1949, Secs. 4434.1 *et seq.*). The pertinent provisions are set out in the Appendix.

STATEMENT

Following the usual proceedings under Section 10 (c) of the Act, the Trial Examiner, on January 14, 1949, issued his intermediate report (R. 60–107), finding that the Company had discharged certain employees in violation of Section

8 (a) (1) and (3) of the Act, and recommending that the Company be required to reinstate these employees with back pay. The Company excepted to the intermediate report (R. 51–53) on the ground, *inter alia,* that the Trial Examiner "failed to recommend that there be deducted from the back pay award for each employee such sums of money as have been received by each employee from the Louisiana Unemployment Compensation Fund." On April 21, 1949, the Board issued its Decision and Order adopting the Trial Examiner's findings and recommendations with modifications not pertinent here (R. 55), and rejecting the Company's contention that unemployment insurance benefits should be deducted from the back pay awards. The Board's order relating to reinstatement and back pay, in the usual form,[1] directed the Com-

[1] The order required the Company to

(a) Offer to [named employees] immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay he may have suffered by reason of the Respondent's discrimination against him by payment to him a sum of money equal to that which he normally would have earned as wages from May 13, 1948, the date of the Respondent's discrimination against him, to the date of the offer of reinstatement, less his net earnings [7] and less willful losses, if any, incurred by him during such period;

[7] By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere, which would not have been incurred but for his unlawful discrimination and the

pany to make the employees whole for their wage losses by paying them what they would have earned had they remained in the Company's employ, less such sums as they actually earned in the interim or failed without excuse to earn.

The Company filed with the court below a petition to review the Board's decision and order (R. 1), contending *inter alia*, that the Board's order, to the extent that it precluded deduction of unemployment insurance benefits, was punitive in character. The Board answered and requested enforcement of its order (R. 15). On January 30, 1950, the court below issued its decision sustaining the Board's finding that the employees were discharged in violation of Section 8 (a) (1) of the Act.[2] The court enforced the reinstatement provision of the Board's order, but modified the back pay provision by permitting the Company to deduct from the back pay due such amounts of money as the employees may have received from

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consequent necessity for his seeking employment elsewhere. *Matter of Crosset Lumber Company*, 8 NLRB 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. *Republic Steel Corporation* v. *National Labor Relations Board*, 311 U. S. 7.

[2] The court reversed the Board's finding that by the discharge the Company also violated Section 8 (a) (3) of the Act and struck from the order a provision requiring the Company to cease and desist from violating this subsection. The Board does not seek review of the judgment below in this respect.

the Louisiana Workmen's Compensation Fund.[3] In explanation of this modification of the order, the court stated, "On the authority of *Republic Steel Corp.* v. *National Labor Relations Board*, 311 U. S. 7, 61 S. Ct. 77, 85 L. ed. 6, we agree with respondent." The Board filed a petition for rehearing (R. 119–132) on the question of the deductibility of the unemployment compensation benefits, which the court denied without opinion on March 18, 1950 (R. 132).

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the Board is required to permit deduction of unemployment compensation benefits from back pay.

2. In relying upon the decision in *Republic Steel Corp.* v. *National Labor Relations Board, supra,* as authority for the holding that unemployment insurance benefits may be deducted from back pay awards.

3. In failing to enforce in full the back pay order of the Board.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below conflicts with the decision of the Court of Appeals for the Seventh Circuit in *National Labor Relations*

[3] The court below in its opinion inadvertently described the State agency as "Louisiana Workmen's Compensation" instead of Louisiana Unemployment Compensation.

Board v. *Marshall Field & Co.*, 129 F. 2d 169, affirmed on other grounds, 318 U. S. 253. In the *Marshall Field* case, the Court of Appeals held that a back pay order which precluded the employer from deducting unemployment insurance benefits received by the discharged employees from the Illinois Unemployment Compensation Fund "was within the powers of the Board" (129 F. 2d, at 173). The court below stated (179 F. 2d, at 502): "We do not agree with the view of the majority in *National Labor Relations Board* v. *Marshall Field & Co.*, 7 Cir., 129 F. 2d 169, that such a holding and order was a lawful and proper one for the Board to make."

In the *Marshall Field* case the court rejected each of the contentions which were advanced by the Company in this case and which apparently were adopted by the court below. The court there held (129 F. 2d, at p. 172), that the mere fact that nondeduction of unemployment compensation benefits might result in some cases in receipt by employees of more money for their period of unemployment than they would have received had they not been discharged did not make the Board's order "punitive." The court said (*ibid.*):

> In private contract or tort cases involving loss of employment * * * the amount of damages recoverable is not affected by collateral benefits paid to the injured person. Yet in these cases, the

> award is not of punitive damages, but of compensatory damages, the purpose of which is to make the injured party whole. The wrongdoer may not be benefited by collateral payments made to the person he has wronged.

The court also held (129 F. 2d, at pp. 172–173), that the fact that the employer is taxed to maintain the unemployment compensation fund out of which benefits are paid does not make the benefits direct rather than collateral. "The benefits in question were paid by the State, not by respondent. How the State raised the funds is a matter between the State and its taxpayers. If the payment of the benefits increases respondent's tax rate, the increase is caused not by the order of the Board, but by the law of the State" (*ibid.*). The court concluded (*ibid.*) that the employer does not have "such an interest in the payments that they should be credited to its account." Cf. *Matter of Cassaretakis,* 289 N. Y. 119, 44 N. E. 2d 391, 394–395, affirmed *sub nom. Standard Dredging Co.* v. *Murphy,* 319 U. S. 306.

2. The decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board,* 311 U. S. 7, which preceded the decision of the Seventh Circuit in the *Marshall Field* case, does not support the judgment of the court below. In that case no question of deductibility of earnings or of collateral benefits from back pay was pre-

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sented. The Board had ordered the employer to deduct from the back pay due sums earned by the employees on work relief projects and to pay such sums to the work relief agencies. The Court held that the order requiring such payments by the employer to public work relief agencies was not designed to make employees whole for losses sustained by them as a result of the unlawful discharges, and therefore exceeded the Board's powers under the Act.

The Board's order in the instant case, on the other hand, does not undertake to deal with the disposition of funds deducted from or included in back pay. The order reflects the Board's conviction that to permit the employer to deduct unemployment compensation benefits, which are "plainly not 'earnings'" (*Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253), from the back pay due would defeat the policy of Congress in authorizing the back pay remedy.

3. The holding of the court below that employers may deduct unemployment compensation benefits from back pay due discriminatorily discharged employees upsets a consistent Board practice of long standing. The Board, early in its history, adopted the view that the function of the "back pay" award authorized by Section 10 (c) of the Act, was to compensate employees for loss of earnings resulting from the discharge.[4]

[4] *Clinton Cotton Mills*, 1 NLRB 97, 121 ("losses of pay"); *Carlisle Lumber Company*, 2 NLRB 248, 278 ("loss of

Consonant with this view, the Board in computing back pay, disregarded both collateral losses and collateral benefits resulting from the discharge, and measured the sum due by the amount the employee would have earned absent the discharge, less such sums as the employee earned, or failed without excuse to earn[5] during the back pay period.

The legislative history of the Wagner Act supports the Board's view that collateral benefits and collateral losses are to be disregarded in computin back pay. Although early versions of the bill which became the Wagner Act authorized the Board to measure awards to discharged em-employees by such broad standards as "substantial justice" and "restitution,"[6] the Act, as adopted,

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wages"); National Labor Relations Board, First Annual Report (1936), p. 129; *Id.*, Second Annual Report (1937), p. 152.

[5] The latter qualification resulted from this Court's decision in *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 198–200. The Board's practice of limiting deductions to "net earnings" during the back pay period was discussed in the *Phelps Dodge* case, 313 U. S., at p. 198, n. 7.

[6] S. 2926, Original Senate Print, 73rd Cong., 2nd Sess., Sec. 205 (c); S. 1958, Original Senate Print, 74th Cong., 1st Sess., Sec. 10 (d); S. 1958, as reported 2nd Senate Print, 74th Cong., 1st Sess., Sec. 10 (c). These bills are reprinted in Legislative History of the National Labor Relations Act, 1935 (G. P. O., 1949), pp. 7, 1302, 2292 respectively. See Senate Memorandum Comparing S. 2926 with S. 1958, 74th Cong., 1st Sess., pp. 4, 34, reprinted in Legislative History of the National Labor Relations Act, 1935, *supra*, at pp. 1324, 1360.

provided for the award merely of "back pay." The legislative history shows that Congress intended thereby to authorize the Board to award an employee unlawfully discharged *"compensation for the time that he has lost through unlawful discharge."* [Emphasis added.][7]

The award of "back pay" thus authorized by Congress under the Act is analogous to the award of damages for wrongful discharge at common law. Under the common law rule damages are awarded to compensate for "loss of earnings," and these are measured by the amount the employee would have earned, absent the discharge, less such sums as the employee earned, or failed without excuse to earn during the period involved.[8] Further, under this test, the employees' collateral losses and benefits incident to the discharge are disregarded in computing loss of earnings.[9] The Court of Appeals for the Eight Circuit in *National Labor Relations Board* v.

[7] Memorandum Comparing S. 2926 with S. 1958, dated March 11, 1935, Senate Committee Print, 74th Cong., 1st Sess., p. 4, reprinted in Legislative History of the National Labor Relations Act, 1935 (Gov't Print. Off., 1949), p. 1324.

[8] Williston on *Contracts* (Rev. Ed. 1937), Sec. 1358; *Restatement of the Law of Torts*, Sec. 924, Comment C.

[9] *Bang* v. *International Sisal Co.*, 212 Minn. 135, 4 N. W. 2d 113, 116; *McCarthy* v. *Palmer*, 29 F. Supp. 585, 588–589 (E. D., N. Y.), affirmed, 115 F. 2d 721, 723 (C. A. 2), certiorari denied, 311 U. S. 680; *Cunnien* v. *Superior Iron Works Co.*, 175 Wis. 172, 187–188, 184 N. W. 767, 770–772; *Bangor & Aroostook R. Co.* v. *Jones*, 36 F. 2d 886, 890–891 (C. A. 1); *Hayes* v. *Morris & Co.*, 98 Conn. 603, 607–608, 119 A. 901; *Overland Construction Co.* v. *Sydnor*, 70 F. 2d 338, 340 (C. A. 6).

Brashear Freight Lines, 127 F. 2d 198, 199, like the Court of Appeals for the Seventh Circuit in the *Marshall Field* case, *supra,* pp. 6–7, pointed to this analogy in upholding the Board's practice of excluding collateral benefits and losses from consideration in computing back pay. In the *Brashear* case, where the employer claimed the right to deduct from back pay the value of groceries received by the discharged employee from his union, the court said:—

> * * * our order could not, we think, be interpreted as intending to give the employer, found to be a wrongdoer, the benefit of gifts or other collateral benefits received by the former employee during his period of unemployment. * * * The general rule that a tortfeasor is not entitled to reduction of damages because the injured one has had the benefit of insurance payments or other collateral benefits would seem to be analogous.

At the time Congress enacted the amended Act it was familiar with the Board's practice of excluding collateral losses which would increase the sum due, and collateral benefits, including unemployment compensation, which would reduce it, from consideration in computing back pay awards.[10] That practice had been approved by the only two Circuit Courts of Appeals which had

[10] See *e. g.*, National Labor Relations Board, Fourth Annual Report (1940), p. 100, n. 25; *id.*, Tenth Annual Report (1946), p. 52; *id.*, Eleventh Annual Report (1947), p. 50.

considered the matter. *Marshall Field* and *Brashear Freight* cases, *supra*. Although Congress amended Section 10 (c) in certain other respects,[11] it reenacted the "back pay" provision without change, thereby indicating its approval of the practice. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114–115; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 313–315.

4. In the *Marshall Field* case, at a time when there was no conflict between the circuits, this Court granted certiorari, on petition of the Company, to review the question here presented, 317 U. S. 617. Decision was reserved, however, since, on review of the record, the Court found that the question had not properly been raised before the Board. 318 U. S. 253, 255–256.

The importance of the question in the administration of the Act has not been diminished by the amendments. Under the Wagner Act over 40,000 workers received upwards of 12 million dollars in back pay awards.[12] Under the Act, as amended, the awards may be even greater, since additional unfair labor practices are defined and unions as well as employers may be liable for back pay.

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[11] Particularly by including a provision authorizing the issuance of back pay orders against labor organizations in appropriate cases.

[12] Twelfth Annual Report of the National Labor Relations Board (1948), Table 7, p. 88. Cf. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 360, n. 4.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,
National Labor Relations Board.

JUNE 1950.

APPENDIX

The pertinent provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, Secs. 141, *et seq.*) are as follows:

> SEC. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *.
>
> * * * * * *

The pertinent portions of the Louisiana Unemployment Compensation Law (Dart's La. Gen. Stat., 1949, § 4434.1 et seq.) are as follows:

4434.1. *Declaration of state public policy.*—As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons. [Acts 1936, No. 97, § 1; 1938, No. 164, § 2.]

4434.2. *Payment of benefits.*—(a) Payment of Benefits. All benefits provided herein shall be payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the administrator may prescribe.

(b) Weekly Benefit Amount.

(1) Weekly Benefit Amount. An individual's weekly benefit amount shall be an amount equal to $\frac{1}{20}$ of his total wages for

insured work paid during that quarter of his base period in which such total wages were highest, except that if such amount is more than $25.00, the weekly benefit amount shall be deemed to be $25.00, or if less than $5.00 shall be deemed to be $5.00, and if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00.

(2) Weekly Benefit. Each eligible individual who is employed [unemployed] in any week shall be paid with respect to such week a benefit in an amount equal to his weekly benefit amount less than part of the wages (if any) payable to him with respect to such week which is in excess of $3.00. Such benefit, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00.

* * * * *

(d) Duration of Benefits. Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of (1) twenty times his weekly benefit amount, and (2) one-third of his wages for insured work paid during the base period; provided that such total amount of benefits, if not a multiple of $1.00, shall be computed to the next higher multiple of $1.00. For the purposes of this section, wages shall be counted as "wages for insured work" for benefit the [sic] purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by whom such wages were paid has satisfied the condition of section 18 (f) [§ 4434.18] or section 7 (c) [§ 4434.7] with respect to becoming an employer.

* * * * *

4434.3. *Benefit eligibility conditions.*—An unemployed individual shall be eligible to receive benefits with respect to any week only if the administrator finds that:

* * * * *

(e) He has during his base period been paid wages for insured work equal to not less than thirty times his weekly benefit amount. For the purposes of this subsection, wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by which such wages were paid has satisfied the conditions of section 18 (f) [§ 4434.18] or section 7 (c) [§ 4434.7] with respect to becoming an employer. [Acts 1936, No. 97, § 3; 1938, No. 164, § 2; 1940, No. 11, § 3; 1944, No. 160, § 1.]

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